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HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1955

No. 905

LEONARD J. SHAFITZ,
Petitioner,
vs.
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

G. LESLIE FIELD,
415 Dime Building,
Detroit 26, Michigan,
Attorney for Petitioner.

Interstate Brief & Record Co., 442 Beaubien St., Detroit 26, Michigan

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the District Court of the United States for the Western District of Kentucky at Louisville upon a jury verdict finding petitioner guilty upon a ten count indictment charging use of the mails to defraud in violation of 18 U. S. C. §1341.

OPINION BELOW

Affirmance of petitioner's conviction was by order. No printed opinion was filed. A copy of the order of affirmance is hereto attached as Appendix A.

STATEMENT OF GROUNDS OF JURISDICTION

1. The judgment of the Court of Appeals was rendered February 28, 1956.

8. Timely application for rehearing was made, which was denied March 30, 1956.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. The indictment charged that petitioner and another "placed or caused to be placed in an authorized depository for mail matter" certain allegedly fraudulent invoices. There was no proof either defendant *placed* the invoices in any authorized depository. Conviction was sustained on the ground that defendants *caused* the invoices to be delivered by mail, and that it was not necessary for the indictment to charge that they did so "knowingly."

Under the circumstances, was the indictment fatally defective in failing to charge an essential element of the statutory offense: viz., that defendant "knowingly" caused the invoices to be delivered by mail?

2. The indictment charged use of the mails between Louisville, Kentucky and Richmond, Virginia. The trial court permitted the jury to consider testimony concerning the mailing of checks from Richmond to New York City, stating in the presence of the jury on objection thereto: "I don't think that's a fatal variance." The trial court refused to charge that the jury must find use of the mails between Louisville and Richmond as charged in the indictment, holding that "the words of the indictment charging only the use of the mail between Louisville and Richmond is superfluous and not an essential part of the charge."

Did the foregoing rulings deprive petitioner of his constitutional right to a fair trial upon the specific charges in the indictment?

3. In his closing argument to the jury, the United States Attorney advised the jury that there was no doubt in his mind about the guilt of defendants, and implored the jury "from the bottom of my heart and with all my sincerity and honesty that I ever had, to render a verdict quickly and swiftly of guilty."

Did this conduct on the part of the United States Attorney deprive petitioner of a fair trial?

CONSTITUTIONAL PROVISION, STATUTE AND COURT RULE INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment: "No person shall • • • be deprived of life, liberty, or property, without due process of law."

The statute is the mail fraud statute (18 U. S. C. §1341) which, in pertinent part, provides:

> "Whoever, having devised • • • any scheme • • • to defraud, or for obtaining money • • • by means of false • • • pretenses • • • for the purpose of executing such scheme • • • places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department • • • or knowingly causes to be delivered by mail according to the direction thereon • • • any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both."

The court rule involved is Rule 7 (c), Federal Rules of Criminal Procedure (18 U. S. C. foll. §3771): "The indictment • • • shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the mail fraud statute (18 U. S. C. §1341) under which petitioner and another were indicted, tried and convicted after trial by jury on all counts of a ten count in-

dictment charging use of the mails to defraud (1a, 3a-8a*). Petitioner was sentenced to serve a year and a day on each count, the sentences to run concurrently, and fined $100 on each count (1a). Sentence was stayed pending appeal (2a).

Petitioner was employed as director of the moving picture department of Reynolds Metals Company (hereafter sometimes referred to as Reynolds) at its Louisville, Kentucky plant during the indictment period (10a). His duties were to produce films for promotional and public relations purposes (10a). In that connection he was authorized to requisition material and services through Reynolds' purchasing department.

The fraud charged was that petitioner and his co-defendant created an alleged musical scoring company (Cinema Scores Company) which invoiced Reynolds for musical scoring alleged to have been performed by Cinema Scores Company on films produced by petitioner, but which had actually been performed by other musical scoring companies under the direction of petitioner for amounts considerably less than the invoiced amounts (3a-9a). All invoices were prepared in Detroit, Michigan by petitioner who personally took them to Louisville (71a). All invoices were addressed to Reynolds at its Louisville, Kentucky plant (11a, 15a, 22a, 26a, 29a, 30a, 33a, 35a, 38a, 72a, 74a).

Each count of the indictment charged that petitioner and his co-defendant "for the purpose of executing the aforesaid scheme • • • placed or caused to be placed in an authorized depository for mail matter at Louisville, Kentucky, a letter addressed to Reynolds Metals Company, Richmond, Virginia, containing the aforesaid invoice • • •

*References are to pages of appendix to petitioner's brief in the Court of Appeals.

to be sent or delivered by the Post Office Establishment of the United States" (3a-9a). There was no proof that either defendant placed the invoices in the post office or an authorized depository for mail (71a-73a). During the cross-examination of petitioner at the trial he was interrogated concerning his knowledge of whether checks in payment of the invoices were mailed from Richmond to Cinema Scores Company in New York City. An objection that the indictment charged mailings only from Louisville to Richmond was overruled by the trial judge who stated in the presence of the jury "I don't think that's a fatal variance" (76a).

At the conclusion of the Government's proofs and again at the conclusion of the trial, petitioner moved for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure, asserting, among other grounds, that since there was no evidence that either defendant placed the invoices in any post office or authorized depository, and since the indictment failed to charge that they had "knowingly" caused them to be delivered by mail, the indictment was fatally defective, and, under the proofs made, would not support a conviction (1a, 70a).

On the issue of mailing, the trial court charged the jury that "you must ask yourself • • • did these defendants use or cause the mails of the United States to be used in the furtherance of this scheme to defraud" (81a). After reading the second paragraph of the first charge (charging use of the mails), the trial court continued: "Now, it is not necessary • • • that the scheme to defraud was intended to be executed by the use of the mails. It is enough that the use of the mails could reasonably be contemplated and would follow in the ordinary course of business. Also, if the scheme is one which reasonably contemplated the use of the mails it is not necessary for the defendants to do

the mailing. It is sufficient if their acts caused the use of the mails by others in the usual course of business" (82a, 83a).

At the conclusion of the charge, the trial court asked counsel if there were any motions. Counsel for defendants requested the court to instruct the jury that they must find that the defendants actually mailed or caused the invoices to be mailed from Louisville to Richmond (as charged in the indictment) or acquit them. The trial court declined to so instruct, stating that "the words of the indictment charging only the use of the mail between Louisville and Richmond (are) superfluous and not an essential part of the charge" (84a). The trial court was also requested to instruct that defendants must have "knowingly" caused the mail to be used, but declined, stating "Well, I think my instructions regarding the mailing or causing to be mailed is from the most recent case of the United States Supreme Court, so I am going to adhere to that" (85a).*

The following occurred during the closing argument to the jury of the United States Attorney (79a):

> "Mr. Walker: • • • There's no question in my mind about the guilt of either one of these men. I say to you that they are guilty beyond all doubt. There's no guilt beyond a reasonable doubt; they are guilty beyond all doubt. All doubt. All doubt.
>
> "Mr. Field: If the Court please, I'd like to record an objection to the statement just made by the Government attorney.
>
> "The Court: All right.
>
> "Mr. Walker: And I say from the evidence that was presented here that was my deduction, and I do not believe that twelve intelligent women and men will be so gullible that they will believe what these

*The case referred to was *Pereira v. United States*, 347 U. S. 1.

defendants have said. I do not believe that you, in your own good conscience, could say these men were not guilty.

"Now, I could talk about more evidence in this case; more of my own deductions; but I feel that you now know as much about this case as anyone knows, and I ask you in good conscience, and from the bottom of my heart, with all my sincerity and honesty that I ever had to render a verdict quickly and swiftly of guilty as to both these defendants.

"Thank you."

REASONS FOR GRANTING THE WRIT

Petitioner contends (a) that the Court of Appeals has rendered a decision herein in conflict with the decisions of other Courts of Appeal on the same matter; (b) that the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court; and (c) that the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

(a) In permitting the indictment to stand without the statutory word "knowingly" where there was no proof that either petitioner or his co-defendant placed the invoices in question in the post office or any authorized depository for mail matter, the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter, viz.: the validity of an indictment failing to charge knowledge where the statute makes knowledge an element of the offense. *United States v. Max*, 3 Cir., 156 F. 2d 13; *United States v. Trypuc*, 2 Cir., 136 F. 2d 900.

Anderson v. United States, 6 Cir., 215 F. 2d 84, cited by the Court of Appeals in the order affirming the judgment of conviction herein (Appendix A) does not support the holding that the indictment was sufficient without the word "knowingly." In *Anderson* the defendants were charged with corruptly endeavoring to impede the administration of justice in a pending criminal case. The indictment followed the language of the statute (18 U. S. C. §1503) and was held sufficient, the court stating: "(t)he language of the indictment charging the offense is in strict conformity with the definition of the offense in the statute." Had the word "corruptly" been omitted from the indictment, the situation would have been analogous and in point. In that event the question would have been, as in the case at bar, whether the indictment charged the essential elements of a crime. Rule 7(c) Federal Rules of Criminal Procedure, requires that "(t)he indictment • • • shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The controlling question in *Anderson* was not whether the indictment charged the essential elements of the crime as defined in the statute, but rather whether the particulars of the violation were sufficiently stated and *scienter* charged. The applicable statute did not make knowledge an element of the offense.* The Court of Appeals had no difficulty in finding that the indictment sufficiently apprised defendants of the particulars of their

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*Where a statute does not make intent or knowledge an element of a crime, it is clear that the indictment need not charge knowledge or intent. *Schultz v. United States*, 9 Cir., 155 F. 2d 721; *United States v. Amorosa*, 3 Cir., 167 F. 2d 596; see also bulletin published by the Department of Justice (Vol. I, May 27, 1946, No. 14) which states: "• • • Where the statute upon which the particular count is predicated makes wilfulness or knowledge an element of the offense, it is, of course, necessary to use the words 'wilfully' or 'knowingly.'"

offense and by fair implication imputed *scienter.* That was the controlling question in *Anderson.* It is not the question in the case at bar. The applicable rule is to be found in *Griffin v. United States,* 6 Cir., 173 F. 2d 909. There defendant had been convicted under a statute making it an offense for one *knowingly* to fail to possess a selective service registration certificate. The indictment under which defendant was convicted did not use the word "knowingly." The omission was held fatal.

(b) The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

By its decision, the Court of Appeals has in effect read the word "knowingly" out of the mail fraud statute. In reaching this result, the Court of Appeals has, it is submitted, misconceived the decision of this Court in *Pereira v. United States,* 347 U. S. 1. It is respectfully contended that the mail fraud statute may not be so construed as to eliminate therefrom the very element which creates the federal offense, to-wit: "knowingly" causing the mails to be used in furtherance of a scheme to defraud. Since knowledge is the gravamen of the federal offense, the indictment should have alleged knowledge, and the jury should have been charged, under the proofs, to find a knowing use of the mails or acquit.*

The point is by no means semantic, since the existence or absence of knowledge may spell the difference between a crime and an innocent act. For example, passing counterfeit money only becomes an offense where the person

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*It is doubtful, however, whether a good charge could have rescued the defective indictment. *Pullen v. United States,* 5 Cir., 164 F. 2d 756; *Sutton v. United States,* 5 Cir., 157 F. 2d 661.

passing it has knowledge that it is spurious (18 U. S. C. §472). In *Spurr v. United States,* 174 U. S. 728, this Court announced the rule that "an evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." Existence of a *mens rea* is the rule rather than the exception to the principles of Anglo-American criminal jurisprudence. *Dennis v. United States,* 341 U. S. 494, 499, 500. This is particularly true under the mail fraud statute where it is the use of the mails that makes the offense a federal crime. *Kann v. United States,* 323 U. S. 88. Even before the 1948 amendment of the statute, it was held that a letter must have been knowingly mailed or caused to be mailed to constitute a violation of the statute. *Spillers v. United States,* 5 Cir., 47 F. 2d 893.

Reliance on *Pereira* is unwarranted. In that case Pereira deposited for collection checks drawn on a bank in California. The only question raised and passed upon was whether Pereira "caused" the checks to be mailed. This Court held that in depositing the checks for collection Pereira knew or could reasonably have foreseen that use of the mails would follow in the ordinary course of business. Whether it was necessary to charge and prove that he "knowingly" caused the mails to be used was not, as stated above, raised or passed on. See *United States v. Taylor,* 2 Cir., 217 F. 2d 397 at 399.

The question raised is one which has not been settled by this Court. It is submitted that it is an important one involving an essential provision of the mail fraud statute, the construction of which is necessary to a proper administration of the Act. Also involved is the sufficiency of the Official Form of indictment under the statute (18 U. S. C. pp. 2560, 2561, Form 3—Indictment for Mail Fraud).

18 U. S. C. §2 is not applicable as neither petitioner nor his co-defendant was shown to have placed the questioned invoices in any authorized depository for mail matter. Moreover, subparagraph (b) of this section of the statute was amended in 1951 by the addition of the word "wilfully" so as to read "(w)hoever wilfully causes an act to be done" etc.*

(c) The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Although the conduct of the United States Attorney in his closing argument to the jury was brought to the attention of the Court of Appeals at the oral argument and in the petition for rehearing, the matter was passed without mention in the order of affirmance.

It is submitted that the type of argument employed by the United States Attorney in the particulars mentioned was highly improper and prejudicial. For him to give the jury his personal opinion on the vital question of guilt or innocence, and in effect to exhort the jury to disregard the evidence, to waste no time on deliberation, and to render a verdict "quickly and swiftly" was incompatible with his responsibilities and duties as an official of the United States Government, and his obligation to discharge

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*As amended, the mail fraud statute appears to cover three situations so far as use of the mails is concerned: (1) Where an individual places a letter in the post office or in an authorized depository for mail matter. In this situation the statute does not require that knowledge be charged; (2) Where one of several individuals places such letter in the post office or authorized depository. Here all become principals and equally responsible for the mailing under 18 U. S. C. Sec. 2 (b); (3) Where there is no direct mailing but the individual causes such letter to be delivered by mail according to the direction thereon. Here knowledge is an essential element of the offense.

his duties fairly and impartially. Assuring the jury of his personal conviction of the guilt of defendants, and pleading with the jury "from the bottom of my heart and with all my sincerity and honesty that I ever had, to render a verdict quickly and swiftly of guilty" may well have tipped the scales unfairly against petitioner and deprived him of that serious consideration of the factual issues by the jury which was his right under the due process clause of the Fifth Amendment.

It is therefore submitted that this permitted departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision. *Berger v. United States,* 295 U. S. 78, 88; *Viereck v. United States,* 318 U. S. 236, 248; *New York Central v. Johnson,* 279 U. S. 310, 316.

CONCLUSION

It is respectfully submitted, therefore, that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submited,

G. LESLIE FIELD,
415 Dime Building,
Detroit Michigan,
Attorney for Petitioner.

APPENDIX A

JUDGMENT

(Filed February 28, 1956)

This appeal from the district court's judgment entered upon a jury verdict finding appellant guilty upon a ten count indictment of using the mails to defraud in violation of 18 U. S. C. A., §1341, was heard on the record, briefs, and oral argument of counsel.

And it appearing that the essential facts constituting the offenses charged were sufficiently set out in the indictment, *Anderson v. United States,* 215 F. (2d) 84 (6 Cir., 1954); that there was substantial credible evidence to support the jury's verdict as to all elements of the offenses prohibited by the statute; and that in instructing the jury the district judge committed no error prejudicial to the appellant, *Pereira v. United States,* 347 U. S. 1 (1954);

It Is Ordered that the judgment of the district court be and it hereby is affirmed.

APPENDIX B

TITLE 18, U. S. C., SECTION 1341— FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, §1, 62 Stat. 763; May 24, 1949, ch. 139, §34, 63 Stat. 94.)

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